

L(417)(a)

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL
DISTRICT BUILDING
WASHINGTON, D. C. 20004



IN REPLY REFER TO:
(L&O:ANC:lng)
(91-164-L) (TCD-5520)

April 22, 1991

Susan Emerson
Commissioner ANC 4-D
P.O. Box 497
Washington, D.C. 20317

Re: May an Advisory Neighborhood Commission elect its officers by secret ballot?

Dear Ms. Emerson:

This is in reply to your recent letter to Acting Corporation Counsel John Payton requesting advice concerning whether it was legally permissible for Advisory Neighborhood Commission (ANC) 4-D to elect its officers by secret ballot at its January 16, 1991 public meeting.

In this regard, you state in your letter that, with respect to the election of officers, Article IV, Section 6 of ANC-4-D's bylaws states that "the election shall take place by roll call vote."

As you are aware, by letter dated April 28, 1988, this Office advised Valerie Costelloe of ANC 3-F that it was not legally permissible for ANC 3-F to employ the secret ballot procedure for the purpose of appointing a person to fill a vacancy on the ANC.¹

The advice rendered to Ms. Costelloe was grounded on an interpretation of the open meetings provision of § 742 of the Self-Government Act, 87 Stat. 831, D.C. Code § 1-1504(a) (1987), which is made applicable to ANCs by § 14(g) of the Advisory Neighborhood Councils Act of 1975, D.C. Code § 1-262(g) (1987). The open meetings provision mandates that when an ANC takes an

¹ Section 8(d) of the Advisory Neighborhood Councils Act of 1975, as amended by § 3(b) of the Advisory Neighborhood Commission Amendment Act of 1990, effective March 6, 1991, D.C. Law 8-203, D.C. Code § 1-257(d) (Supp. 1991), now provides that a vacancy on an ANC is filled via a special election conducted by the Board of Elections and Ethics.

"official action" it must do so at a meeting that is open to the public. The election of officers by an ANC is an official action of the ANC, and therefore must take place at a public meeting. See the attached copy of a letter, dated January 31, 1990, from the Corporation Counsel to Councilmember Betty Ann Kane. Following our advice to Councilmember Kane, the Council enacted § 3(d)(4) of the Advisory Neighborhood Commission Amendment Act of 1990, D.C. Law 8-203, which amended § 14(e) of the Advisory Neighborhood Councils Act of 1975, D.C. Code § 1-262(e), to provide in pertinent part that "[e]ach Commission shall elect from among its members at a public meeting held in January of each year a Chairperson, Vice-Chairperson, Secretary, and Treasurer." (Emphasis added.) The intent of D.C. Code §§ 1-1504(a) and 1-262(e) is that the public shall have the opportunity to observe not only the discussion on a proposed ANC official action, but also how each member of the ANC votes on that proposed action. Thus, secret ballot voting is inconsistent with the intent of both provisions.

In the above-cited letter to Ms. Costelloe, this Office pointed out the distinction between private citizens voting in a political election and publicly elected officials voting on matters coming before them in their official capacities:

...[I]t should be noted that the time-honored right of secrecy enjoyed by a private citizen voting in political elections has no applicability to publicly elected officials (such as ANC Commissioners) when they vote in their official capacities on public questions before them, including the public question of who is best qualified to fill an interim ANC vacancy. ANC Commissioners, like other publicly elected officials, are accountable to their electorates, and secret voting on any question that comes before them in their official capacities is incompatible with the principle of public accountability of publicly elected officials. [Emphasis added.]

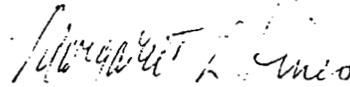
In sum, assuming the correctness of the facts stated in your letter, the secret ballot procedure used by ANC 4-D to elect ANC officers at its January 16, 1991 public meeting violated D.C. Code § 1-1504(a) (1987). The secret ballot procedure employed had the legal effect of ANC 4-D's electing its officers at a meeting that was not "open to the public" as required by D.C. Code § 1-1504(a). Accordingly, by the terms of D.C. Code § 1-1504(a), that election of officers cannot be regarded as "effective."²

² See page 39 of the ANC Manual (1991-1992) where ANCs are advised not to use secret ballot to elect their officers. The referenced "February 16, 1989 opinion of the Corporation

Furthermore, assuming the correctness of your citation of Article IV, Section 6 of ANC 4-D's bylaws, namely that the election of officers "shall take place by roll call vote," it must be concluded that the January 16, 1991 secret ballot election of ANC 4-D's officers was in violation of its own bylaws, and was therefore invalid for this reason as well.

ANC 4-D should conduct a new election of officers in compliance with its bylaws and the statutory provisions applicable to ANCs. However, because they have the status of "de facto" officers, the official actions taken by the improperly elected officers of ANC 4-D in their official capacities as such officers are not invalid insofar as such actions concern the public or third persons who have an interest in those actions. See 3 McQuillin, Municipal Corporations § 12.106 (3rd Ed. 1990).

Sincerely,



Margaret L. Hines
Deputy Corporation Counsel, D.C.
Legal Counsel Division

cc: Honorable James E. Nathanson
Joan M. Thomas, ANC 4-D
Virgil Thompson

Attachment

Counsel" is a letter to ANC 3-C Commissioner Philip Mendelson in which this Office reaffirmed its April 28, 1988 advice to Valerie Costelloe.